

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE DEPARTMENT OF COMMERCE

In the Matter of the Real Estate
Salesperson License Application of
Marjorie Elizabeth Savik

**FINDINGS OF FACT,
CONCLUSIONS AND
RECOMMENDATION**

The above-entitled matter came on for hearing before Administrative Law Judge Beverly Jones Heydinger (“ALJ”) on May 9, 2006, at the Office of Administrative Hearings, 100 Washington Avenue South, Suite 1700, Minneapolis, Minnesota 55401. The hearing was held pursuant to a Notice of and Order for Hearing dated January 23, 2006. The hearing record closed at the end of the hearing on May 9, 2006.

Christopher M. Kaisershot, Assistant Attorney General, 1200 Bremer Tower, 445 Minnesota Street, St. Paul, Minnesota 55101-2130, appeared on behalf of the Minnesota Department of Commerce (Department). Charles O. Amdahl, Attorney at Law, Suite 1050 Flour Exchange, 310 Fourth Avenue South, Minneapolis, Minnesota 55415, appeared on behalf of Marjorie Elizabeth Savik (“Respondent”).

NOTICE

This Report is a recommendation, not a final decision. The Commissioner of Commerce will make the final decision after reviewing the record and may adopt, reject or modify these Findings of Fact, Conclusions, and Recommendations. Under Minn. Stat. § 14.61, the Commissioner’s decision shall not be made until this Report has been available to the parties to the proceeding for at least ten (10) days. An opportunity must be afforded to each party adversely affected by this Report to file exceptions and present argument to the Commissioner. Parties should contact Kevin Murphy, Deputy Commissioner, 85 Seventh Place East, Suite 500, St. Paul, Minnesota 55101, to ascertain the procedure for filing exceptions or presenting argument to the Commissioner.

If the Commissioner fails to issue a final decision within 90 days of the close of the record, this report will constitute the final agency decision under Minn. Stat. § 14.62, subd. 2a.¹ The record closes upon the filing of exceptions to this report and the presentation of argument to the Commissioner, or upon the expiration of the deadline for doing so. The Commissioner must notify the parties and the Administrative Law Judge of the date on which the record closes.

¹ Unless otherwise indicated, all statutory references are to Minnesota Statutes 2004.

STATEMENT OF ISSUES

1. Did the Respondent engage in fraudulent, deceptive, and dishonest practices in violation of Minn. Stat. § 82.35, subd. 1(b)?

2. Did the Respondent engage in acts that demonstrate she is untrustworthy, financially irresponsible, or otherwise incompetent or unqualified to act under the license granted by the Commissioner in violation of Minn. Stat. § 45.027, subd. 7(a)(4)?

3. Does the Criminal Rehabilitation Act preclude Respondent's disqualification from licensure as a real estate salesperson?

FINDINGS OF FACT

1. The Respondent applied for a Real Estate License on October 24, 2005.² As part of the application, an applicant is required to provide background information including whether the applicant has "ever been charged with, or convicted of, or been indicted for, or entered a plea to, any criminal offense, . . . other than traffic violations, in any State or Federal Court?" The Respondent answered "yes."³

2. Prior to her application for a Real Estate License, Respondent was a paddlewheel operator for Eastside Neighborhood Services ("ESNS") at Gabby's Bar.⁴

3. A paddlewheel game is similar to roulette. The player buys chips from an operator. The chips are used to purchase slips, and the slips are placed on certain numbers or blocks of numbers. A paddlewheel is designed to bring in a profit for the operator. The odds of winning are smaller than the payouts for winning tickets.⁵

4. The operator is required to keep careful records of the amount wagered and the amount paid out on each spin of the paddlewheel. For each spin of the wheel, losing tickets are removed, and winning tickets are paid. Over time, the payouts approximate the odds that are built into the game. By not clearing the losing tickets before the next spin, the operator gives the ticket holder a second chance to win. This is called "double spinning," and the charity running the paddlewheel operation loses the benefit of the losing tickets. "Double-spinning" is felony cheating in Minnesota.⁶

5. ESNS contacted the Alcohol and Gambling Enforcement Division of the Department of Public Safety when its profit from the paddlewheel at Gabby's Bar dropped below the expected level.⁷ Profits for the periods that the Respondent

² Ex. 7.

³ Ex. 7 at 2.

⁴ Ex. 8. Though ESNS owned the paddlewheel, it was operated at Gabby's Bar.

⁵ Test. of Cliff Emmert; Ex. 3 at 2; Ex. 12.

⁶ Ex. 3 at 3; Ex. 4 at 3; Test. of Cliff Emmert.

⁷ Ex. 3 at 2.

operated the paddlewheel dropped from an initial level of 14% in 2002 to a cumulative low of 6.9%.⁸

6. In response to the contact from ESNS, Cliff Emmert from the Alcohol and Gambling Enforcement Division conducted an investigation. A camera installed at Gabby's routinely recorded the operation of the paddlewheel. Emmert reviewed 30 days of videotapes at Gabby's, and compared the videotapes with the gambling records of money collected and paid out. Exhibit 1 is two discs that include eight portions of the videotape, each one showing the Respondent double-spinning. In one of the eight instances she received a tip from a game player when she spun the wheel without picking up the losing tickets. Other portions of the videotapes identified three other employees who were double-spinning.⁹

7. Mr. Emmert contacted the Minneapolis Police Department and arranged to have certain employees interviewed, including the Respondent. During the interview the Respondent demonstrated her understanding of the paddle-wheel operation, including the required record-keeping. She acknowledged that double-spinning was not permitted, but that sometimes customers complained that the wheel had not gone around four times as required, or had not been spun in the direction opposite from the prior spin, as was her customary practice. When customers complained, she would occasionally re-spin so that the customers would have fun and continue to play. She understood that an employee could get in trouble for double-spinning, but admitted that she did occasionally double-spin. She was not aware that double-spinning was a crime.¹⁰

8. Respondent was charged with one count of Felony Cheating in violation of Minn. Stat. § 609.76, subd. 3(i)(4) (2003), and one count of Felony Theft Over \$500 in violation of Minn. Stat. § 609.52, subd. 2(1) and 3(3)(a) (2003).¹¹

9. Respondent pled guilty to Minn. Stat. § 609.76, subd. 3(ii)(4), a gross misdemeanor, for manipulating a gambling device to affect the outcome of the game. Respondent was sentenced to 365 days in jail, 335 of which were stayed, subject to performing 160 hours of community service within 180 days, paying restitution in the amount of \$604.00, and committing no new offenses for two years.¹²

10. Respondent has performed the required community service, and paid the required restitution. All terms of the sentence will be met if Respondent commits no new offenses prior to August 3, 2006.¹³

⁸ Test. of Cliff Emmert.

⁹ Test. of Cliff Emmert.

¹⁰ Exs. 2, 8.

¹¹ Ex. 4 at 3-4.

¹² Exs. 5, 6.

¹³ Ex. 6; Ex. 8 at 3.

11. On November 16, 2005, the Department notified the Respondent that it would recommend denial of Respondent's Real Estate License Application, based on her criminal offense. It denied the license because Respondent had a criminal conviction related to her trustworthiness to handle others' money, and her honesty. The letter also informed Respondent that she could request a contested case hearing.¹⁴

12. Respondent formally requested a hearing on December 6, 2005.¹⁵

13. During the fall of 2005, the Respondent worked as a hostess at the Parade of Homes, in a home valued at over three million dollars. Its owner, Adam Johnson, a licensed real estate salesperson and licensed residential contractor, worked along with the Respondent at the home, guiding visitors and responding to questions about the home and its furnishings. At no time during her employment did Mr. Johnson doubt the Respondent's honesty or trustworthiness. Mr. Johnson was always in the home when the Respondent was. Mr. Johnson has worked with many real estate salespeople and is confident that the Respondent is capable of doing the job well and honestly.¹⁶

14. A real estate salesperson has access to homes when the owners are not present. A real estate salesperson may occasionally handle cash transactions, but ordinarily checks are written to and delivered to the broker.

15. In order to protect the public, the Department does not grant a license to persons that it believes are dishonest. It believed that Respondent's criminal conviction related directly to her ability to perform the job of a real estate salesperson, because of the access to people's homes and financial information. The Department concluded that sufficient time had not passed to assure that the Respondent has sufficiently rehabilitated and shown her fitness to perform the duties of a real estate salesperson.¹⁷

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The Administrative Law Judge and the Commissioner of Commerce are authorized to consider the Respondent's application for a real estate sales license pursuant to Minn. Stat. §§ 45.027, 82.35, subd. 6, and 14.50 (2004).

2. Respondent received due, proper and timely notice of issues in this proceeding and the time and place of hearing. This matter is, therefore, properly before the Commissioner and the Administrative Law Judge.

¹⁴ Ex. 9.

¹⁵ Ex. 10.

¹⁶ Ex. 11; Test. of Adam Johnson.

¹⁷ Test. of J. Christopher Lubin, Department investigator.

3. The Department has complied with all relevant procedural requirements.
4. The Respondent has the burden of showing by a preponderance of the evidence that she meets the requirements applicable to real estate sales persons.
5. The Respondent has engaged in an act that is a fraudulent, deceptive and dishonest practice in violation of Minn. Stat. § 82.35, subd. 1(b).
6. The Respondent has engaged in an act that is untrustworthy, financially irresponsible, or otherwise incompetent and renders her unqualified to act as a real estate salesperson, in violation of Minn. Stat. § 45.027, subd. 7(a)(4).
7. The Respondent's conviction for theft related to gambling constitutes a basis to censure, suspend or revoke her license as a real estate salesperson. Because the conviction relates to theft of money, it directly relates to the licensed occupation of real estate salesperson. The Respondent has failed to show evidence of sufficient rehabilitation and present fitness to perform the duties of a real estate salesperson, as required by Minn. Stat. § 364.03, subs. 1-3.
8. The Department has demonstrated that it had an adequate basis to deny Respondent's license.

RECOMMENDATION

IT IS HEREBY RECOMMENDED: that the Commissioner of the Department of Commerce DENY the Respondent's application for a license as a real estate salesperson.

Dated this 25th day of May, 2006

s/Beverly Jones Heydinger
BEVERLY JONES HEYDINGER
Administrative Law Judge

Tape-recorded (one tape)

NOTICE

Under Minn. Stat. § 14.62, subd. 1, the agency is required to serve its final decision upon each party and the Administrative Law Judge by first class mail or as otherwise provided by law.

MEMORANDUM

The Commissioner of Commerce has the authority to license real estate salespersons. Statutes and rules governing the profession outline with specificity the conduct expected of such persons. A conviction for theft is sufficient evidence of the Respondent's dishonesty and financial irresponsibility to warrant denying her license. The Respondent contends that in her case, the conviction is not evidence that she is dishonest or financially irresponsible because she did not know that double-spinning was illegal. However, this is not a compelling argument. The record shows that when the Respondent began her employment, the charity's draw was at the expected level, but after the Respondent gained experience, the returns dropped. This pattern reinforces the Department's conclusion that double-spinning was not the result of poor training or inadvertent error. Instead, as Respondent admitted, she allowed double-spinning so that the game players would have a good time and stay at the wheel. It should have been obvious from the requirements for detailed bookkeeping that failure to remove losing bids from the table before spinning again would result in losses for the charity, her employer.

The Respondent has not presented sufficient evidence of rehabilitation and present fitness to perform the duties of a real estate salesperson. The statute addressing rehabilitation states that an individual shall not be disqualified "if the person can show competent evidence of sufficient rehabilitation and present fitness to perform . . . the occupation for which the license is sought."¹⁸ It further states that sufficient evidence may be established by copy of a release order and evidence that at least a year has passed since release without a subsequent conviction, and an order of discharge from probation or parole.¹⁹ The Respondent has yet to complete two years without offense, one of the terms of her sentence.

The licensing agency is also directed to consider the nature and seriousness of the crime, circumstances surrounding it, the person's age when the crime was committed, the time elapsed, and any other competent evidence including letters of support.²⁰

The Respondent was an adult when she committed her offense. Although she did not know double-spinning was a crime, she knew it was wrong and that another employee had been disciplined for it. This reinforces the Department's conclusion that the Respondent has poor judgment. Although the Respondent presented a letter and the testimony of Adam Johnson, a former employer, praising the Respondent's job performance, Mr. Johnson acknowledged during his testimony that he was present in the home where the Respondent was working. This is not strong evidence of her trustworthiness or good judgment.

¹⁸ Minn. Stat. § 364.03, subd. 3.

¹⁹ *Id.*

²⁰ *Id.*

Given that the Respondent's crime involved misuse of money and dishonesty, and that she has not completed her sentence, it is reasonable for the Department to refuse to grant her a real estate salesperson license at this time.

B.J.H.